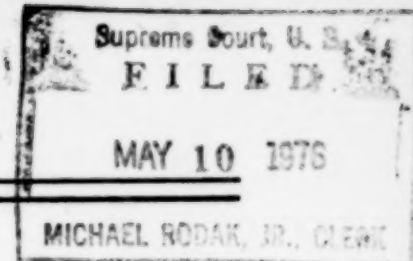


APPENDIX



In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-661

UNITED STATES OF AMERICA,

Petitioner

—v.—

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 3, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-661

UNITED STATES OF AMERICA,

Petitioner

—v.—

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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* A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-15a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 16a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Criminal No. 2-74-15

UNITED STATES

v.

LEONARD FRANCIS DAVISON
WILLIAM ANDREW DAVISON
GABRIEL FRANCIS ANTELOPE
and
NORBERT HILLARY SEYLER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1974	
April 16	Filed Indictment * * * *
April 29	Record of arraignment; Deft. L. Davison pleaded not guilty to Counts 1, 2, and 3; Deft. W. Davison pleaded not guilty to Count 3; Deft. Antelope pleaded not guilty to Counts 1, 2, and 3; Deft. Seyler pleaded not guilty to count 3 * * *. * * * *
May 28	Filed order of dismissal of Deft. Seyler (JBA) Book 4 p. 138. * * * *
May 31	Filed jury verdict—guilty all 3 counts—deft. Antelope. Filed jury verdict—guilty all 3 counts—deft. L. Davison. Filed jury verdict—guilty to Count 3 to lesser included offense of 2nd degree murder—deft. W. Davison. * * * *

DATE	PROCEEDINGS
1974	
June 14	Record of sentencing: Deft. Wm. Davison sentenced to 12 years under FYCA under 18 U.S.C. 1111 and 5010(c) * * *.
	* * * *
	Record of sentencing: Deft. Leonard Davison sentenced to 15 years Count 1, 15 years Count 2 and life Count 3 under FYCA. All terms to run consecutively * * *.
	* * * *
	Filed order modifying sentence as to Deft. L. Davison; Sentences to run concurrently (JBA) Book 4 p. 144.
	* * * *
	Record of Sentencing; Deft. Antelope sentenced to 15 years Count 1; 15 years Count 2, and life Count 3 all to run consecutively * * *.
	* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 74-2741
74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GABRIEL FRANCIS ANTELOPE,
LEONARD FRANCIS DAVISON,
and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS

DATE	PROCEEDINGS
1974	
September 16	Docketed cause and entered appearances of counsel.
	* * * *
1975	
July 8	Argued and Submitted to: Kilkenny, Choy, Goodwin, CJJ
September 4	Filed Opinion—Affirmed in part and reversed in Part. Filed and Entered Judgment.
October 16	Issued Judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR 2 74 15

UNITED STATES OF AMERICA

—vs.—

LEONARD FRANCIS DAVISON,
WILLIAM ANDREW DAVISON,
GABRIEL FRANCIS ANTELOPE,
and
NORBERT HILLARY SEYLER,
DEFENDANTS

INDICTMENT

(Violation 18 USC 1153 & Idaho Code
Sections 18-1401 & 18-1402; 18 USC
2111; and 18 USC 1111)

The Grand Jury charges:

COUNT ONE

(Vio. 18 USC 1153 and Idaho Code
Sections 18-1401 & 18-1402)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON and GABRIEL FRANCIS ANTELOPE, enrolled Coeur d'Alene Indians, did purposely, knowingly, unlawfully, and feloniously enter in the nighttime into a certain building, to-wit, a house located in Block 29 of the City of Worley, Idaho, the residence and property of Emma Teresa Johnson, a non-Indian, with the purpose then, there and therein to commit a felony, that is, robbery.

COUNT TWO
(Vio. 18 USC 1153 and 2111)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON and GABRIEL FRANCIS ANTELOPE, enrolled Coeur d'Alene Indians, by force and violence and against resistance and by putting in fear, unlawfully and wilfully did take from the person and presence of Emma Teresa Johnson, a non-Indian, a thing of value, that is, a purse and an undetermined amount of money, all being the property of the said Emma Teresa Johnson.

COUNT THREE
(Vio. 18 USC 1153 and 1111)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON, WILLIAM ANDREW DAVISON, GABRIEL FRANCIS ANTELOPE and NORBERT HILLARY SEYLER, enrolled Coeur d'Alene Indians, with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and wilfully did kill Emma Teresa Johnson, a non-Indian, by beating the said Emma Teresa Johnson with their fists and feet.

A TRUE BILL

DONALD A. GETTLE, Foreman

MIKEL H. WILLIAMS

Assistant United States Attorney

[296] [DIRECT EXAMINATION OF
NORBERT H. SEYLER]

* * *

Q. All right. Thank you. What did you do after getting out of the car?

A. We went to the house [of Emma Johnson].

Q. Who was "we"?

A. Me, Gabe [respondent Antelope] and Bumbee [respondent William Davidson].

Q. Now, how did you say you went to the house? Who was the first one to enter the house?

A. Gabe.

Q. Who was the next one to enter the house?

A. Bumbee.

Q. Who was the last one to enter the house?

A. Me.

Q. Now, what did you see when you first entered the house?

A. (No response.)

Q. What was the first thing that you saw?

A. I saw Gabe standing over Mrs. Johnson.

Q. What?

A. I saw Gabe standing over Mrs. Johnson kicking her.

Q. Did you see J. R. [respondent Leonard Davison] at that time?

A. Yes.

Q. Where was he?

A. He was in the bedroom digging into some drawers.

[297] Q. Do you recall how many times Gabe Antelope kicked Mrs. Johnson?

A. No.

Q. Can you make an estimate?

MR. BOWLES: I object. He has testified that he does not recall.

THE COURT: You may answer the question, Mr. Seyler, if you can make any kind of a reasonable estimate. If you feel that you cannot, why, of course you should not answer.

THE WITNESS: Eight times.

THE COURT: Pardon me?

THE WITNESS: Around eight times.

THE COURT: Of course, you understand that's just an estimate; is that correct? Is that just an estimate?

THE WITNESS: Yes.

Q. BY MR. WILLIAMS: Now, when you went to the house, first went up there, did you notice if the door was open or closed?

A. It was open.

Q. Were there any lights on in the house when you went in?

A. Yes.

Q. What light was this, or could you tell?

A. The bedroom light and the living room light.

[298] Q. And you say when you went in Mrs. Johnson was lying on the floor?

A. Yes.

Q. Now, were you able to tell if that was the same Mrs. Johnson that you had seen on previous occasions?

A. Yes.

Q. Was it?

A. Yes.

Q. Now, you stated that Gabriel Antelope was kicking her. Now, where were his blows landing, if you were able to tell?

A. The head.

Q. How was he kicking her? Can you describe it?

A. He was just standing above her stomping on her.

Q. What type of shoes did he have on?

A. Black boots.

Q. Excuse me. I didn't hear that.

A. Black boots.

Q. Approximately how far off the floor was Mr. Antelope lifting his foot as he was going through what you have described as the stomping action?

A. I wasn't watching his foot lots of times.

Q. Did this appear to have any effect on [299] Mrs. Johnson that you could see, visual effect?

A. Yes.

Q. What was this?

A. She was bleeding pretty bad.

Q. Did you say anything to Gabriel Antelope at this time?

A. Yes.

Q. What did you say?

A. I said "Don't. She's already dead."

Q. What was his response?

A. He says "I want to make damn sure."

MR. BOWLES: I didn't hear the response.

THE WITNESS: "I want to make damn sure."

Q. BY MR. WILLIAMS: Now, did anyone approach Gabriel Antelope while he was doing this?

A. Yes.

Q. Who was this?

A. J. R.

Q. What did he do?

A. He was trying to hand Gabriel a razor knife.

Q. Did he say anything?

A. Yes.

Q. What did he say?

A. He said "Cut her throat."

Q. What response, if any, did Gabriel Antelope [300] say?

A. He said "No, I'll kick her to death."

Q. What, if anything, happened after Gabriel Antelope had kicked Mrs. Johnson? Did anyone else approach her?

A. Yes.

Q. Who was this?

A. Bumbee.

Q. What did he do?

A. He kicked her in the head twice.

Q. What was J. R. and Gabe doing at this time?

A. They was in the bedroom looking around for some stuff to take.

MR. WILLIAMS: I request that the witness be allowed to approach what has been marked as Plaintiff's, I believe—

THE COURT: You may step down, Mr. Seyler.

Q. BY MR. WILLIAMS: Do you still have your green pen, Mr. Seyler?

A. Yes.

Q. Would you place an "S" where you were standing in the house.

MR. REED: At what point in time?

Q. BY MR. WILLIAMS: When you first entered the house.

[301] A. (Witness complied.)

Q. Now, could you place a double X where you say you first saw Gabriel Antelope.

A. (Witness complied.)

Q. Could you draw a straight green line to represent how Mrs. Johnson was lying on the floor.

A. (Witness complied.)

Q. Where was William Davison when you saw him when you first went in the house?

A. (Witness indicated.)

Q. How did you mark that?

A. With a "D."

Q. Would you place an "L. D." where you saw Leonard Davison.

A. (Witness complied.)

Q. Now, did you go into the house any further than that at any later time, than where you have marked on the diagram?

A. Yes, sir.

Q. Where did you go?

A. About right here (indicating).

Q. Would you place a double S there, please. Put two SS's, please.

A. (Witness complied.)

Q. You may return to the witness stand.

* * *

[478] [Excerpts from the Court's Instructions]

* * *

INSTRUCTION NO. 29

It is charged in Count III of the indictment that on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country the defendants Leonard Francis Davison, Wil-

liam Andrew Davison, and Gabriel Francis Antelope, enrolled Coeur d'Alene Indians, with malice aforethought and in the perpetration of the robbery alleged in Count II hereof, unlawfully and wilfully did kill Emma Theresa Johnson, a non-Indian, by beating the said Emma Theresa Johnson with their fists and feet.

[479] INSTRUCTION NO. 30

Section 2111 of Title 18, United States Code, provides in pertinent part as follows: "Murder is the unlawful killing of a human being with malice aforethought. Every murder committed in the perpetration of any robbery is murder in the first degree."

INSTRUCTION NO. 31

Five essential elements must be proved in order to establish the crime of murder in the first degree as charged in Count III of the indictment: First, that the crime, if you find that a crime was committed, occurred within the Indian country and within the exterior boundaries of the Coeur d'Alene Indian Reservation;

Second, that the defendants Leonard Francis Davison, William Andrew Davison, and Gabriel Francis Antelope are Indians;

Third, that the defendants killed Emma Theresa Johnson unlawfully;

Fourth, that the act was done with malice aforethought;

And fifth, that the act was done in the perpetration of a robbery.

Again, the burden is always on the [480] prosecution to prove every essential element of the crime charged beyond a reasonable doubt.

INSTRUCTION NO. 32

Malice may be either expressed or implied. Malice is implied when the killing is a direct causal result of the perpetration of a felony inherently dangerous to human

life. The mental state constituting malice aforethought does not necessarily require any ill will or hatred toward the person killed.

Aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede, rather than follow, the act.

INSTRUCTION NO. 33

Perpetration means the performance or commission of a crime, thus you may not find the defendants guilty of the crime of murder in the first degree by reason of a killing during the perpetration of a robbery unless you find beyond a reasonable doubt that at the time of the killing the defendants were engaged in the performance or commission of a robbery, either as principals or as aiders, abettors, as those terms are defined later in these instructions.

[481] INSTRUCTION NO. 34

The unlawful killing of a human being, whether intentional, unintentional, or accidental which occurs as a result of the commission of the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit the crime of robbery is murder of the first degree, even though the killing was not planned as a part of the robbery. The specific intent to commit robbery and the commission of such a crime must be proved beyond a reasonable doubt.

INSTRUCTION NO. 35

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such course is consistent with the facts found by the jury from the evidence in the case and with the law as given in the instructions of the Court.

So if the jury should unanimously find the defendant not guilty of the crime of murder in the first degree, then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

The crime of murder in the first degree by [482] reason of a killing committed in the perpetration of a felony necessarily includes the lesser offense of second degree murder.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. 2-74-15

UNITED STATES OF AMERICA

vs.

WILLIAM ANDREW DAVISON, DEFENDANT

JUDGMENT AND COMMITMENT

On this 14th day of June, 1974 came the attorney for the government and the defendant appeared in person and with his counsels Scott Reed and John Walker Esqs.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty to the lesser included offense of second degree murder of the offense of first degree murder in violation of 18 USC 1153 and 1111 as charged in Count 3 of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

The Court finds the defendant was 14 years of age at the date of conviction and is suitable for handling under the Federal Youth Corrections Act (18 USCA 5005-5024).

IT IS ORDERED AND ADJUDGED that the defendant is hereby committed to the Attorney General or his authorized representative for a term of imprisonment of 12 years pursuant to 18 USCA 5010(c).

THE COURT SPECIFICALLY FINDS that because of defendant's background, lack of guidance and train-

ing, his amoral, asocial and calloused attitude toward life and his responsibilities to himself and society, that he probably will not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of six years from the date of conviction and therefore the Court imposes this extended term of imprisonment for treatment and supervision and until discharged by the Division as provided in Section 5017(d) of Title 18.

IT IS STRONGLY RECOMMENDED that defendant be confined at separate institution from Gabriel Francis Antelope and from Leonard Francis Davison.

IT IS FURTHER STRONGLY RECOMMENDED that defendant be afforded and receive in-depth psychiatric, psychological and social study, treatment and counseling, as well as educational and skilled trade training.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. 2-74-15

UNITED STATES OF AMERICA

vs.

LEONARD FRANCIS DAVISON, DEFENDANT

JUDGMENT AND COMMITMENT

On this 14th day of June 1974 came the attorney for the government and the defendant appeared in person and with his counsels Scott Reed and John Walker, Esqs.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty of the offenses of burglary in violation of 18 USC 1153 and Idaho Code, Secs. 18-1401 and 18-1402, robbery in violation of 18 USC 1153 and 2111, and first degree murder in violation of 18 USC 1153 and 1111 as charged in Counts 1, 2 and 3 of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted,

The Court finds the defendant was 17 years of age at the date of conviction and is suitable for handling under the Federal Youth Corrections Act (18 USCA 5005-5024).

IT IS ORDERED AND ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment for life upon conviction of first degree murder and pursuant to 18 USC 1111 as to Count 3 and

for a term of imprisonment of 15 years on Count 2 pursuant to 18 USC 1153 and 2111 and for a term of imprisonment of 15 years on Count 1 pursuant to 18 USC 1153 and I.C. 8-1401 and 18-1402. Said terms of imprisonment are to run consecutively.

THE COURT SPECIFICALLY FINDS that because of defendant's background, lack of guidance and training, his amoral, asocial and calloused attitude toward life and his responsibilities to himself and society, that he probably will not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of six years from the date of conviction and therefore the Court imposes this extended term of imprisonment for treatment and supervision and until discharged by the Division as provided in Section 5017(d) of Title 18.

IT IS STRONGLY RECOMMENDED that the defendant and Gabriel Francis Antelope be confined at separate institutions during the respective periods of confinement.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. Cr. 2-74-15

UNITED STATES OF AMERICA

v.

GABRIEL FRANCIS ANTELOPE, DEFENDANT

On this 14th day of June, 1974 came the attorney for the government and the defendant appeared in person and with his counsel, Allen Bowles, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty of the offenses of burglary in violation of 18 USC 1153 and Idaho Code, Secs. 18-1401 and 18-1402, robbery in violation of 18 USC 1153 & 2111, and first degree murder in violation of 18 USC 1153 & 1111 as charged in Counts 1, 2, and 3 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of life upon your conviction of first degree murder and pursuant to 18 USC 1111 as to Count 3 and for a term of imprisonment of 15 years on Count 2 pursuant to 18 USC 1153 and 2111 and for a term of imprisonment of 15 years on Count 1 pursuant to 18 USC 1153 and I.C.

18-1401 and 18-1402. Said terms of imprisonment are to run consecutively.

IT IS STRONGLY RECOMMENDED that the defendant and Leonard Davison be confined at separate institutions during their respective periods of confinement.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

The Court recommend commitment to:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. No. 2-74-15

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LEONARD FRANCIS DAVISON,
WILLIAM ANDREW DAVISON
and
GABRIEL FRANCIS ANTELOPE,
DEFENDANTS

ORDER MODIFYING SENTENCE

It appearing to the Court from the reporter's notes taken at the sentencing hearing, that the Court, through mistake and inadvertence, announced that the sentences imposed as to the three counts of the indictment were to run "consecutively" and it was the purpose and intent to impose concurrent sentences as to all three counts in view of the youthfulness of the defendant, Leonard Francis Davison, and other considerations, and it appearing to the Court that said sentence ought to be amended to reflect the true intent and purpose thereof, and pursuant to Rule 35, Federal Rules of Criminal Procedure

IT IS HEREBY ORDERED that the sentence this date imposed upon Leonard Francis Davison only be, and it is hereby modified and amended to provide that the sentences on all three counts shall run concurrently.

DATED this 14th day of June, 1974.

/s/ J. Blaine Anderson
United States District Judge

20

SUPREME COURT OF THE UNITED STATES

No. 75-661

UNITED STATES, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.